

No. 89-700

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Supreme Court, U.S.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

Astroline Communications Company
Limited Partnership,
Petitioner,
v.

Shurberg Broadcasting of Hartford, Inc.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**OPPOSITION TO MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE**

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February 20, 1990

9 p

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Respondent Shurberg Broadcasting of Hartford ("Shurberg") hereby opposes the Motion for Leave to File Brief Amicus Curiae submitted in this case by the Committee to Promote Diversity ("CPD"). In its brief, CPD supports the Petitioner in this case and is, therefore, adverse to Shurberg's position. As set forth below, the identity of those representing CPD here creates at least an appearance of impropriety which can be corrected only by rejection of CPD's brief.

As indicated in CPD's Motion, Shurberg did not consent

to the filing of CPD's Brief.¹ Shurberg first learned of CPD's interest in submitting a brief herein during the afternoon of February 7, 1990, two days before briefs in support of Petitioner were due to be filed. Undersigned counsel was contacted, by telephone and telecopied letter, by CPD's counsel of record. That same afternoon, undersigned counsel consulted with his client and was advised that Shurberg would not consent to CPD's request for reasons set out below. CPD's counsel of record was notified of this the same afternoon.

The factual basis for Shurberg's opposition is as follows. The law firm of CPD's counsel of record is Pepper & Corazzini. An associate at that firm, Neal J. Friedman, was previously associated with the firm of Bechtel & Cole, Chartered, which has represented Shurberg throughout this litigation. During his term of employment at Bechtel & Cole, Chartered, Mr. Friedman performed legal services for Shurberg in connection with this litigation. Moreover, during that term Mr. Friedman's office was immediately adjacent to that of undersigned counsel; in view of his physical proximity and the limited number of attorneys in the firm, Mr. Friedman had access to a wide variety of information concerning Shurberg and its conduct of this case.

The individual identified as "Chief Counsel" for CPD in its brief is Thomas A. Hart, Jr. Although not disclosed by CPD in its brief, Mr. Hart was counsel for Petitioner Astroline Communications Company Limited Partnership ("Astroline") from its formation, in 1984, until his substitution as counsel of record before the Court of Appeals, below, in May, 1989. *See, e.g.,* J.A. 30, 33. Also not disclosed by CPD is the fact that Mr. Hart was, at least for a time, a general partner in Astroline, according to a report submitted by Astroline to the Federal Communications Commission ("FCC") on September 13, 1985.

¹ By contrast, Shurberg has consented to all other *amici* seeking such consent.

Also not disclosed by CPD is the fact that Mr. Hart appears to have been the initial promoter of Astroline -- he had previously represented Astroline Company (a separate entity which is a non-minority participant in Astroline, *see* J.A. 68-69), and was reported to have "arranged [the] marriage" between Astroline Company and Richard Ramirez which culminated in the formation of Petitioner Astroline. *Hartford Courant*, February 3, 1985, "Channel 18 Sale: Perfume, Preacher, and a Whiff of Intrigue", at A20.²

Because of the foregoing facts, Shurberg refused to consent to the filing of the CPD brief.³ Disciplinary Rule 4-101(B) of the District of Columbia Bar provides that

... a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client. . . .

Shurberg is concerned that the facts and circumstances presented here could result in the disclosure (whether or not

² The *Hartford Courant* quoted Mr. Hart as stating that, after first meeting Mr. Ramirez, "I kind of stashed [Mr. Ramirez] away as a potential participant in the Hartford deal." *Id.* A relevant portion of the *Hartford Courant* article is set forth in the attachment hereto.

³ In advising CPD's counsel of record of the denial of consent, Shurberg's counsel referred only to the apparent conflict presented by the possible involvement of Neal J. Friedman. No reference was made at that time to the involvement of Mr. Hart because it had not been disclosed theretofore to undersigned counsel that Mr. Hart would be involved at all; undersigned counsel learned of Mr. Hart's involvement only upon receipt of CPD's brief on February 9, 1990.

intentional) of confidences.

Mr. Friedman represented Shurberg and had access to confidential information, strategies and deliberations with regard to Shurberg in this very case. Mr. Friedman would therefore be prevented from himself representing another party whose interests in this matter are adverse to Shurberg's. *E.g., Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980); *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980).⁴ Any knowledge which Mr. Friedman obtained in the course of his representation of Shurberg -- and, therefore, Mr. Friedman's disqualification from representing an adverse party -- are attributable to his new law firm. See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir.), *cert. denied*, 438 U.S. 955 (1978); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976). Any efforts (*e.g.*, a "Chinese wall") which might be made⁵ to prophylactically shield Mr. Friedman from any involvement in this matter at his new firm could not cure that firm's disqualification. As stated in *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, *supra*,

⁴ In the related, albeit distinct, context of whether an attorney may litigate disqualification questions independent of the client's litigation, this Court has consistently held that the interests of clients and the integrity of the process of federal court litigation are paramount to the interests of attorneys who seek to preserve their attorney-employment positions when disqualification questions arise. *Richardson-Merrill, Inc. v. Koller*, 472 U.S. 424 (1985); *Flanagan v. United States*, 465 U.S. 259 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 445 U.S. 368 (1981).

⁵ During a brief telephone conversation on the afternoon of February 7, 1990, CDP's counsel of record informally advised undersigned counsel that one or more affidavits addressing, and supposedly precluding, any inference of a conflict of interest or other impropriety had been or were being prepared. No such affidavits have as yet been provided to undersigned counsel or (to the best of my knowledge) to the Court.

. . . we do not recognize the wall theory as modifying the presumption that actual knowledge of one or more lawyers in a firm is imputed to each member of the firm. 580 F.2d at 1321.

Nor is it necessary for Shurberg to establish that confidential information has in fact been used against it in the representation of CPD. As stated in *Trone v. Smith*, *supra*,

Disqualification does not depend upon proof of the abuse of confidential information. Because of the sensitivity of client confidence, disqualification is required when lawyers change sides in factually related cases. 621 F.2d at 1001.

Shurberg is understandably unwilling to consent to representation of an adverse *amicus* by a firm with access to substantial confidential information about Shurberg.

Aggravating the matter of Mr. Friedman's involvement is the matter of Mr. Hart's involvement. Because of his extensive role in the formation of Astroline, and because he was a general partner in Astroline during the pendency of this case below, Mr. Hart is more than just Astroline's former counsel -- he is in a sense a surrogate Astroline. Shurberg does not believe that it is proper for an individual so integrally involved with Petitioner to ally with a firm whose attorneys include a former counsel for Respondent for the purpose of submitting a brief adverse to Respondent's interests here.

Ethical Consideration 9-2 of the District of Columbia Bar states in relevant part:

Public confidence in the law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. . . . When explicit ethical

guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

This is, of course, merely an "ethical consideration", and not a disciplinary rule. It is therefore hortatory rather than mandatory. Nevertheless, the confluence of factors presented here -- most notably Mr. Friedman's prior representation of Shurberg and Mr. Hart's involvement as "Chief Counsel" for CPD and his substantial involvement in Petitioner Astroline -- create an appearance of impropriety which the Court should not condone. Accordingly, Shurberg opposes CPD's Motion for Leave to File its brief herein.⁶

Respectfully submitted,

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February 20, 1990

⁶ Rejection of CPD's brief will not adversely affect the Court's ability to resolve the issues in this case. Four other briefs, on behalf of a total of nine separate *amici*, have been filed in support of Petitioner herein. See also Sup. Ct. R. 37.1

ATTACHMENT

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Excerpt from Hartford Courant, February 3, 1985, A20:

*"Channel 18 Sale: Perfume, a Preacher,
and a Whiff of Intrigue"*

* * *

Hart [Thomas A. Hart, Jr.] . . . saw an opportunity for several moneyed clients of the firm [with which he was then associated]. One was the Astroline Corp., a big oil wholesaler based in Saugus, Mass. . . .

* * *

. . . Hart began negotiating directly with Faith Center [the then-licensee of Channel 18] on behalf of Astroline. But even if they could work out a price for Channel 18, a key piece of the puzzle was still needed - a minority partner so they could comply with the FCC's distress sale rule.

Hart already had someone in mind. Several months earlier, an old friend in the radio business in Boston introduced him to [Richard] Ramirez.

* * *

. . . While Channel 18 wasn't discussed at first, Hart recalled, "I kind of stashed Rich away as a potential participant in the Hartford deal."

The Astroline Communications Co. - the product of the arranged marriage between Ramirez and Astroline Corp. - was born last May 29 [1984].